Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

DONNA FRED,

Petitioner,

WACKENHUT CORPORATION AND
OMAHA PUBLIC POWER DISTRICT,

Respondents.

Petition For Writ Of Certiorari To The U. S. Court of Appeals For The Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

Noemi A. Collie
State Bar No. 04589100
Counsel of Record
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)

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QUESTIONS PRESENTED

I.

Has the Eighth Circuit's finding that the trial court made no errors of law or fact so far departed from the accepted and usual course of judicial proceedings, or has it sanctioned such a departure by the lower court, as to call for an exercise of the Supreme Court's power of supervision?

II.

May the Respondents as a matter of law rely on the Petitioner's alleged conduct or mental state as the basis for their decisions to suspend and terminate her when the conduct or mental state, if any, clearly would not have occurred but for the allegations of sexual harassment brought by Petitioner and where the sexual harassment was known to the Respondents, but not remedied?

III.

Can Respondents be said to have taken prompt, effective and remedial action when their response to Petitioner's complaints of a sexually hostile environment brought by Petitioner was to deny her a transfer; to place the solution to the problem in her hands; to formally discipline her; to suspend her pending an investigation into her complaints; to force her to submit psychological evaluations; to accuse her of being mentally unfit for duty; and then to terminate her?

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Petitioner, Donna Fred, respectfully prays that a Writ of Certiorari issue to review the judgment of the Eighth Circuit Court of Appeals entered on May 4,1995.

OPINIONS BELOW

After a trial before the court, the district court rendered a judgment and issued its Memorandum Opinion on August 15,1994. (App. A). The Eighth Circuit Court of Appeals affirmed the judgment of the district court without opinion on May 4, 1995 (App. B), and Judgment was entered on May 4, 1995. (App. C).

JURISDICTION

This Court's jurisdiction of this appeal is based on the judgment of the Eighth Circuit Court of Appeals entered on May 4, 1995. This Court has jurisdiction to review the judgment of the Eighth Circuit under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

This case was brought alleging a sexually hostile environment and wrongful termination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Sec. 2000e, et al. ("Title VII"). The particular statutory provisions are as follows:

> It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ...., sex,.....

42 U.S.C. Sec. 2000e-2(a) [Title VII].

> It shall be an unlawful employment practice for an employer to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed a practice made an unlawful employment practice by this title or because he has made a charge, testified, assisted, or participated in an manner in an investigation, proceeding, or hearing under this title.

42 U.S.C. Sec. 2000e-3(a) [Title VII].

STATEMENT OF THE CASE

Respondent Wackenhut (TWC) was contracted to provide nuclear security officers for the Respondent Omaha Public Power District (OPPD) at the Fort Calhoun Nuclear Power Station. Petitioner came highly qualified and was personally recommended to Wackenhut's off site supervisor, Larry Jones, for the job. At trial Mr. Jones testified Petitioner was exactly what he was looking for. After passing an MMPI exam, a physical exam, and a background check, Petitioner was certified as being mentally and physically capable of performing the duties of an armed Nuclear Security Officer on January 30, 1989. On February 5, 1989 Petitioner was hired by Wackenhut for the position of Nuclear Security Officer at the Ft. Calhoun Station. During her interview with Mr. Jones, a male applicant was told to hurry up and get his paper work handed in or Petitioner would be promoted before him. When questioned about how the applicant felt about that he indicated he would be willing to work along side Petitioner, to which Jones responded by saying he could handle that.

Petitioner began training in radiation protection, the handling of fire arms, fire protection, the use of a gas mask and other protective gear, and in conducting foot patrols and hostage negotiations on February 5, 1989. The training was accelerated because the Station was going on line on March 5, 1989. Fred passed her training courses and was certified to begin work when the Station went on line. She was assigned to a team consisting of herself and 16 male officers. Once on duty Petitioner was subject to a dual chain of command consisting of OPPD and TWC officers.

During the training period, Petitioner had to complain to those in charge that the men in her group were guilty of horse play and of making a lot of noise which was preventing her from being able to concentrate on her studies. In response the noise was made worse. Petitioner was at one time referred to as "old lady" by her weapons instructor. In order to complete her training, Petitioner had to retake the NGET exam one time, however, this was allowed and others were required to do the same.

Upon completing the NGET exam, Petitioner returned to her team members who were completing their training on locating the many doors within the Station. One of her team members had to be

ordered to help her complete her orientation as to the doors since no one would volunteer for the job.

Upon beginning her duties, Petitioner began to have difficulty locating the doors. As a result Petitioner asked for some additional training. Because of this her team members gave her a hard time, despite the fact that she did not really have any more trouble then they did. In order to obtain the additional training on locating the doors, Petitioner was decertified on March 8, 1989. In addition to the decertification, Petitioner's rate of pay was reduced to training pay. She complained about this since she did not feel it was right when her team members were also in training during much of this time and were still receiving full pay. In response to her complaint she was told by Mr. Jones that there is no such think as being half pregnant.

From March 8, 1989 to March 17, 1989 Petitioner was assigned perimeter post duties as opposed to foot patrol assignments which would have required she go inside the Station. While on perimeter post assignments, Petitioner and her team members were provided intercoms so that they could chat with each other and stay alert. Petitioner complained during this period of time to both OPPD and TWC supervisors about what she perceived as being degrading conversations about women being conducted over the intercoms. These conversations consisted of statements about women giving head to the boss, what the men would like to do to a particular woman, innuendoes about sexual acts including squeaky chairs, and general conversations about different woman's body parts. Although OPPD took no action in response to her complaints, TWC's Mr. Jones issued an Employee Bulletin dated March 13, 1989 condemning the use of such language over the intercoms. Despite this warning, similar conversation continued. For example, another female officer was referred to as "anaconda woman" while her relationship with another officer was being discussed. Petitioner described the communications as showing in general a show of disrespect toward woman. At one point in time, Petitioner was told by one of her team members that where he came from "woman were second class citizens," and then asked her opinion on the subject.

On March 17, 1989 Petitioner was recertified after completing a timed test on the doors. When she returned to her team members she was not congratulated, but instead handed a Styrofoam

cup with the statement "suck my dick Ma-Donna" written on it along with a drawing of a woman with a sad face and two large breasts. This fact was brought to the attention of both TWC and OPPD supervision, but no action was taken. Instead she was told that she was capable of handling the situation and that she should try to become a part of the team.

On March 18 or 19, 1989 Petitioner and her team members attended emergency response training. One of her team members indicated out loud that only those with military training would be required to know the information. Petitioner in response asked the instructor who would need to know the information being taught. OPPD's Karl Karlson who was presiding over the lecture responded that all individuals would need to know it. In response to this one of her team members accused her of having something against the military and of being a know-it-all. Petitioner responded by stating that she had nothing against the military, in fact, several of her family members had been in the military. She then took the opportunity to bring up the cup incident and to state her concerns about whether her team members would be there to back her up if the occasion arose. Upon leaving the room, Mr. Karlson informed Petitioner that the cup incident sounded like sexual harassment to him.

On March 20, 1989 Petitioner was informed by Mr. Karlson that he had called a meeting other TWC and OPPD supervisors to discuss the issue of harassment and the fact that some of the men had taken it upon themselves to put graffiti on the bathroom walls. At trial it was determined that at least some of this graffiti had been directed at Petitioner and other woman.

Sometime during March 22nd through the 24th Petitioner and her team members were conducting a mock hostage negotiations. Petitioner was sent outside the room where the negotiations were being conducted and ordered by one of her co-workers to guard a particular door in the hall way where she could neither hear or see what was going on. When she moved down the hall still keeping the door she was to be guarding in sight so that she could see into the room and hear the process, the co-worker who had ordered her outside the room yelled at her to go back to her post and that she would never be anything other then a "fucking" guard. Just prior to this incident, while they had been practicing outdoor searches, Petitioner was asked to hide along with other officers while others

searched them out, but instead of searching her out she was left hiding until she finally left to return to the training facility where she found her team members began to laugh and snicker at her arrival.

In addition to these incidents, Petitioner was subjected to counseling on the proper use of her radio because her team members had been walking over her transmissions and it was thought she did not know how to use the radio properly.

On March 25, 1989 Petitioner and her team members returned to normal duty. At the end of the shift, OPPD's shift supervisor, Ron Undajon, called a meeting to discuss various problems including the harassment which had been occurring. During this meeting Mr. Undajon discussed the importance of working together as a team and then turned the floor over to Petitioner so that she could address her concerns. Petitioner described the harassment she had been experiencing and was immediately verbally attacked by her team members, including a female officer from another team, who asked her why she should be upset about it if she wasn't. The situation got so bad that Mr. Undajon had to intervene and state that he was not going to allow everyone to attack one person. The meeting ended with everyone angry and upset at Petitioner. After this meeting Petitioner was referred to as Number 11 whenever she was discussed among her team members, and there was no further sexually explicit communications over the intercoms, however, the squeaky chair noises and laughter continued..

TWC's team leader, Mr. Boettger, prepared a memo memorializing the meeting which was distributed to Petitioner's team. The memo simply stated that there was a difference between harassment and humor and that they would all have to take it as well as dish it out. It further stated that focusing on one person was crossing the line to harassment. This memo also advised the team members on the chain of command which was to be the team leader an then the shift supervisor. It did not mention whether it meant the Mr. Jones of TWC or Sgt. Tibbs of OPPD when referring to the shift supervisor. Petitioner had previously been instructed that when it came to safety violations in the Station she was to go directly to her on site supervisor, OPPD's Sgt. Tibbs. No specific instructions were ever given to her about who she should complain to about her sexual harassment claims, however, both OPPD's and TWC's sexual

harassment policies allowed Petitioner to go to her supervisor and then to anyone higher up if the need arose.

Prior to the March 25, 1989 meeting Petitioner had been called on the carpet by Mr. Jones for not going to her team leader with her complaints and that this was a violation of the chain of command. Petitioner informed Mr. Jones that she had informed her team leaders and that they were fully aware of what was going on, but that they had not followed the chain of command and informed him.

Immediately after the March 25, 1989 meeting Petitioner was approached by Mr. Undajon in the parking lot and informed that he felt she could handle the situation and that she was an intricate part of the team. Petitioner asked him for a transfer in that she did not see much hope of being allowed to become a member of the team. In response Mr. Undajon gave Petitioner seven days to go around to each of her team members and ask them what it was about her that they did not like. Petitioner responded that she did not know how this would help the situation, but agreed to do it. Mr. Undajon ended the discussion by telling her that she needed to get more "personal" with her team members. Sgt. Tibbs testified that she felt it was high time for the meeting and that although Mr. Undajon indicated during the meeting that he would not tolerate the type of conduct complained about by Petitioner, there was a lot of tolerance.

The next day Petitioner was again approached by Mr. Undajon and her team leader, Mr. Beottger. It was again stressed that she needed to become a member of the team and that she should work on doing this. Petitioner again stressed the harassment she was experiencing and again requested a transfer which was again denied because it would look bad for him when it came time for raises.

Although the lewd language over the intercoms ended, after the March 25, 1989 meeting, her communications were still being walked on. Additionally, the squeaky chair noise accompanied by the laughter of the men continued over the intercoms. During the last week of her employment she began to be relieved late which in turn caused her to be late in relieving the person at her next post. She was the one accused of being the cause of this problem.

Petitioner attempted to comply with Mr. Undajon's orders to speak to her team members about the problems they were experiencing. She did speak to many of them, however, some made

it difficult. Mr. Alsharabi refused to speak to her altogether. When she spoke to another, Mr. Buckingham, he referred to an incident where she had asked for a second opinion on a question after having already asked him. He indicated he had nothing against her personally and said nothing when she asked him if the problems they were having was because she was a woman. Once Petitioner had seen a strange light in the yard and not being able to identify it asked Mr. Buckingham if he could. Instead of responding in a professional manner, noises about flying saucers and remarks like, "Oh look, there's a flying saucer," came over the radio in a high pitched voice made to sound like a woman.

On April 6, 1989 Petitioner came into work and went to sign in on the pass on log. When she did this she noticed someone had forged her name at the top of the log normally reserved for the supervisor, and that the supervisor had noted on the log, "[d]o not alter face card pictures - it is a reportable incident." Petitioner informed the supervisor, OPPD's Sgt. Tibb's, about her name being forged and asked her what had been done to the face card pictures. Tibbs informed Petitioner that they had been drawing mustaches on them. Although Sgt. Tibbs did not confirm it at the time, Petitioner believed they had drawn the mustache on her face card badge. At trial Sgt. Tibbs confirmed that Petitioner's badge had in fact been defaced.

Petitioner went ahead to her assigned post. While there she heard over the radio that Mr. Alsharabi was being sent into a radiologically controlled area. Upon his exiting the area Petitioner was able to see Mr. Alsharabi wearing gloves of the type that would be worn under protective clothing. By this time Petitioner was suspicious and concerned for her safety as she had been repeatedly sent into radiologically controlled areas and left to stand there to be "crapped up" or exposed to some contamination. This had happened enough times to cause Mr. Alsharabi to joke with her over the radio, "Hey Fred, how come your the one always getting crapped up?" Petitioner was usually following Mr. Alsharabi in rotation when this occurred.

Shortly after Mr. Alsharabi had exited the area, Petitioner was ordered by Sgt. Tibbs to enter the same area. Petitioner was concerned since she had not been scheduled to do foot patrols that day and because earlier that day Mr. Alsharabi had angrily interrupted

some friendly conversation between her and another team member over the intercom saying he did not have to listen to what they were talking about over the intercoms and that it really did not matter since she would not be there much longer. Upon entering the HP corridor Petitioner checked the sign in logs to see if there were any special instructions regarding protective clothing, and noticed someone sitting in the corridor where there was normally no one. Since there were no instructions regarding protective clothing and she had heard Mr. Alsharabi saying he was putting on protective clothing when entering the same area, she rechecked the logs and then reluctantly entered the area. Upon exiting the area the ambient air and the PCM monitors, which indicate when there is a contamination or exposure, began to sound the alarms. The person who had been sitting in the corridor got up and left without speaking to her. Another OPPD officer came down and asked her where she had gone, and then told her to go back to her work area without explaining what had just happened. When Petitioner attempted to sign back out on the sign on log, as was the normal procedure, she was told twice by the OPPD officer not to do so. Petitioner informed Sgt. Tibbs about her concerns about Mr. Alsharabi and requested to be taken out of rotation behind Mr. Alsharabi. It was Petitioner's contentions at trial that she had been intentionally exposed to radiation by Mr. Alsharabi or management or both. Some evidence was presented at trial which indicated that she had in fact suffered some exposure during her employment, and there was not one piece of evidence presented by the Respondents which either denied the incident or explained it.

When she returned to her work area, Petitioner was met by Sgt. Tibbs who asked her whether she was all right and why she had not been sent upstairs. Petitioner was instructed to wait there until a ride could be obtained to take her to her next post. While Petitioner was doing as instructed Mr. Alsharabi called the work area several times demanding to know why she had not relieved him yet. Petitioner finally hung up on him after being instructed to do so by the same individual who had approached her after she set off the alarms. When Petitioner was finally able to relieve Mr. Alsharabi he was so angry at her that he pushed the door into her on the way out without saying a word to her.

After returning to the work area about an hour later, Petitioner was radioed by Mr. Boettger to wait for him there. When

he arrived she was ordered to follow him into an office where he placed a document entitled "Record of Formal Counseling." Before her. It accused Petitioner of violating the chain of command by going to Sgt. Tibbs with her concerns that day, of failing to provide TWC with a contact number, and of failing to follow Mr. Undajon's orders to talk to each of her team members and that any further problems with her team members would result in the filing of aberrant behavior charges against her.

Petitioner attempted to explain that she had provided a contact number, but did not want it given to her team members considering the harassment she had been experiencing on the job, that she did not believe she had gone outside the chain of command, and that she had at least attempted to speak to each of her team members as she had been instructed to do. Petitioner refused to sign the document and asked to speak with Mr. Undajon. Sgt. Tibbs testified that Petitioner was upset, but not out of control during this meeting and that she herself believed the discipline was too severe for the situation. Mr. Beottger indicated in a report he drafted that Petitioner was "totally irrate and irrational."

When Petitioner met with Mr. Undajon she indicated to him that it was not she who should be disciplined, but her team members and refreshed his memory to the fact that it was they who were making it impossible for her to become a team member by their acts of harassment. She also informed him as to the events of the day. In response, Mr. Undajon told her to shut up and threatened her with the deactivation of her badge. When she continued to discuss the problems she had been faced with since beginning training only two months earlier and brought to his attention that she believed the situation had now become a safety hazard within the Station, her badge was deactivated. Her weapon was taken from her and she was escorted out into the hall and instructed to wait for Mr. Jones to arrive. Mr. Undajon wrote up a report in which he accused Petitioner of ranting and raving about "trivial matters, i.e., her name being signed on the Sgts. line on the pass on log - the harassment that was inflicted by her peers" during this meeting.

Petitioner waited without incident for several hours for Mr. Jones to arrive. When he did he had a brief discussion with Mr. Undajon and then returned to her to inform her that he had no choice, but to suspend her pending an investigation since her badge had been

deactivated. Petitioner did her best to attempt to dissuade him from taking this action, but was unable to do so, and finally went home.

Petitioner denied becoming irrate or irrational or of ranting and raving about trivial matters.

On or about March 27, 1989 Mr. Jones conducted an investigation in which he basically asked each of Petitioner's team members whether or not Petitioner was being sexually harassed. Each member said that they had done nothing wrong and that Petitioner brought on her own problems. One team member confirmed the cup incident, but it was not looked into any further.

On April 13, 1989 Petitioner provided her employers a 35 page handwritten statement about many of the problems she had experienced with her team members which she believed to be because of her gender and which had created a hostile environment to the point where she was being intentionally exposed to radiation. There were incidents discussed in this document and the statement prepared by Mr. Undajon regarding what happened during his discussion with Petitioner about the Record of Formal Counseling which were not specifically identified in her EEOC complaint, however, her and which were later however, they were not brought up for the first time at trial.

On May 5, 1989 Petitioner filed her NEOC complaint against TWC. She also filed complaints with the Nuclear Regulartory Commission believing she had been intentionally exposed to radiation in retaliation for her having made her complaints about harassment. Her NEOC complaint was later amended in July to include OPPD.

On May 8, 1989 Petitioner was informed that she would be required to retake the MMPI. Although she was concerned the MMPI would be used against her she decided to take the exam so that she could attempt to return to work.

Petitioner was scheduled to see a Dr. James Burger, a clinical psychologist hired by Respondents, who gave her the second MMPI. The second test was determined to be basically the same as the first, with a few exceptions which Dr. Burger testified could have been due to the fact that Petitioner was under some stress and did not trust him. Dr. Burger testified that he made no determination as to whether Petitioner's claims of sexual harassment were valid, but because of these claims sent her to see a Dr. Caroline G. Sedlacek because she had some experience in dealing with sexual harassment.

Dr. Sedlacek gave Petitioner a Rorschach examination. Neither doctor made a determination as to the truth of her allegations and neither made any actual diagnosis of Petitioner. Based on Petitioner's scores on these exams and using the employers' view of what had been transpiring at work, Dr. Burger made the determination that he could not certify her mentally fit for duty since she did not meet some of the behavioral unreliability criteria required by the Nuclear Regulartory Commission. Drs. Burger and Drs. Sedlacek both indicated they could not base their decision Petitioner did not meet these criteria strictly on the test results, and that they relied on information provided by the employers which they had accepted as truth in coming to their conclusions. Not being able to say whether her claims of sexual harassment and a hostile environment were valid they could not say whether her test results were due to the harassment she was experiencing or not. In fact Dr. Burger testified that he would not have decertified Petitioner solely based on the test results and his interview with her, but then with some prompting from the Judge, changed his testimony to say that he "probably would have...but its hard to say..." In all Dr. Burger said nothing that was inconsistent with Petitioner's claims that she was being sexually harassed at work or that her problems as he perceived them were not directly related to the harassment she was experiencing.

When Dr. Burger refused to certify Petitioner as being mentally fit, she was terminated by TWC.

REASONS FOR GRANTING THE WRIT

I.

WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY THE LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The court of appeals found there were no errors of law or fact in regards to the trial court's findings that Petitioner had failed to

prove many of her allegations of sexual harassment ever occurred, despite the fact that the record is replete with numerous incidents other then the cup incident which were in fact supported by the evidence.

For example, the trial court was in error as a matter of fact in finding Petitioner had failed to prove that there was lewd language being used over the intercoms. Both Petitioner and several others testified in trial that there was lewd language being used over the intercoms. In fact the testimony was both undisputed and corroborated that in response to Petitioner's complaint on March 13, 1989 about this language a memorandum was issued ordering such language to be terminated on the intercoms. If the intercoms were not working as the court determined there would have been no point in issuing the memorandum. The trial court's conclusion that the intercoms were not even working made in reliance of testimony by Sgt. Tibbs was also clearly erroneous since she did not testify that the intercoms were not working, only that she believed that only two intercoms were working at the time. So long as at least two were working then Petitioner would have on occasion had the opportunity to hear such language. Further, the trial court was in error as a matter of law in determining that even if sexual comments complained of had in fact been made over the intercom, they could not support Petitioner's claims since they were not directed at her. As a matter of law all acts within a claim of a hostile environment need not be directed at the Petitioner in order for her to be able to rely on them. *Hall v. Gus Center Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).

Another example of sexual harassment which was indisputably supported by the evidence other then Petitioner's testimony alone, but which the trial court refused to consider was the graffiti in the men's bathrooms. Again there was testimony by other individuals other then Petitioner which support this claim. It is undisputed that such conduct was occurring and that the bathroom had to be closed down to be repainted. It is also undisputed that some of the graffiti was directed specifically at Petitioner, as well as, other woman. Again even if the graffiti was not directed at Petitioner specifically, it would be an error in law to require that the graffiti have been directed at Petitioner in order to be considered an act of sexual harassment. *Id.*

Another example of sexual harassment which was supported by the testimony was the fact that Petitioner's name was forged on the pass on log and that her face card badge was defaced with the drawing of a mustache on it. Although the court had given credence to Sgt. Tibbs statements regarding the intercoms, it without explanation gave no credence to the fact that Sgt. Tibbs' testimony also supported Petitioner's testimony regarding the sign on log and the defacing of her badge. Finally, no testimony was provided to contradict the truth of these acts of sexual harassment.

There is no dispute that Petitioner was the one instructed to go around to her co-workers and find out what it was they did not like about her. Retaliatory counseling and disciplinary actions such as this can as a matter of law be grounds for a hostile environment sexual harassment claim when the employer was aware of the harassment. *Degrace v. Rumsfeld*, 614 F.2d 796, 804 (1st Cir. 1980); *see also Harrison v. Reed*, 603 F. Supp. 1457, 1462 (E.D. Mo. 1985); and *see* EEOC Decision No. YSF 9-108 (1973) CCH EEOC Decisions Para. 6030 (retaliatory counseling, suspension pending investigation, termination or putting the solution to the problem in the hands of the plaintiff can not constitute corrective action on the part of the employer).

In all there were many acts of sexual harassment which were either supported by credible testimony other then Petitioners or were totally undisputed by the Respondents. Considered in total, these acts of harassment were severe and pervasive enough to create a sexual harassment hostile environment as alleged by the Petitioner, and the lower courts were clearly in error.

These are but a few of the many errors of fact and law which the Petitioner argued the trial court had made on appeal and which were all but ignored by the court of appeals. A thorough review of the record unmistakably leaves one with the definite and firm conviction that a mistake has been committed with regard to whether Petitioner suffered from a sexual harassment hostile environment at work. When one is left with such a definite and firm conviction that a mistake has been made, the court of appeals should as a matter of law reverse the trial court's decision. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). By refusing to acknowledge the multitude of clearly erroneous conclusions of fact and law made by the trial court and the court of

appeals failure to remedy these errors, the court of appeals made an error of law which so far departs from the accepted and usual course of judicial proceedings, or merely sanctions such a departure by the lower court such as here, there is a special and important reason to call for an exercise of the Supreme Court's power of supervision.

It is clear there were in fact many clear errors of both fact and law which the court of appeals has sanctioned in the instant case, and it should not be allowed to do so without at least an response to each legitimate argument Petitioner made to the contrary. By simply burying Petitioner's many legitimate concerns in a decision without an opinion, the court of appeals has failed in its duties.

WRIT OF CERTIORARI SHOULD BE GRANTED BECAUSE THE EIGHTH CIRCUIT COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE SUPREME COURT.

By the court of appeals affirmance of the trial court's opinion that there was no evidence that the Petitioner's suspension or termination was due to anything other then her alleged violations as noted in the Record of Formal Counseling or her reaction to being formally counseled by Beottger, Undajon or Jones on April 6, 1989, the court of appeals has in effect determined as a matter of law that the Respondents may rely on the conduct and mental state of the Petitioner even if that conduct and mental state is caused directly and solely by the sexual harassment which the Respondents are aware of. Justice can not allow this to occur.

At the very least the Respondents were aware of the language over the intercoms, the cup incident, the graffiti, on the wall, and the hostility shown Petitioner during the March 25, meeting. There is no question Respondents were aware of the hostile environment and in fact attempting to solve the problem by requiring Petitioner speak to her team members and try to become a member of the all male team. Being aware of the hostile environment it was error as a matter of law for the lower courts to determine it was all right for Respondent's to refuse to transfer Petitioner and to order her to find out why she was not liked by her team members. When harassment is known to the employer it should not be allowed to throw the problem back in

the hands of the employee and then be allowed to use the employee's inability to solve the problem as an excuse for taking further action against the employee. This is exactly what the lower courts in the instant case have done.

In making this determination the court of appeals has decided an important question of federal law which has not been settled by the Supreme Court, but which should be, i.e, should an employer be allowed to use the reasonable conduct of an employee which is caused by the sexual harassment experienced by that employee, in order to justify its actions against that employee for such conduct? Additionally, the court of appeals has decided this question in such a way that it is inherently unjust to those who would venture to make a complaint about sexual harassment, such as Petitioner, in that it places the burden of solving the problem on the individual being harassed and in effect legitimates retaliatory conduct by the employer, or the Respondent in this case.

Since the Petitioner's reaction to being formally counseled was clearly directly related to the alleged sexual harassment and her complaints of sexual harassment, and clearly would not have occurred but for the sexual harassment and her complaints about it, the Respondents should not be allowed to rely on this conduct to argue it had a justification for suspending her or requesting that she submit to psychological examinations. It should be error as a matter of law for the lower courts to have found that Respondents could meet their burden of proof under a mixed motive case to show they would have suspended or terminated Petitioner even if they would not have considered her gender under these circumstances?

The Petitioner identified and presented evidence in support of several incidents which she contends were acts of sexual harassment by her peers and by her joint employers,[1] and which were directed at

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1 The district court determined there was a fact issue raised as to whether TWC, OPPD, or both entities employed Petitioner, however, it also found resolution of this issue was unnecessary because it did not find a violation of Title VII. Petitioner would argue the determination of this issue was in fact pertinent to the court's determination of whether there was a violation of Title VII since the issue of whether there was joint control over Petitioner and whether she had a dual chain of command, is pertinent to the question of whether Petitioner ever deserved to be counseled for not following the chain of command which in turn is

her because of her gender and/or because of her complaints of sexual harassment. These ranged from the individual acts of harassment by her team members to her termination by the Respondents. Petitioner has argued the totality of all acts complained of, and which occurred within a two month period, were so severe and pervasive that a hostile environment was created within her workplace. The lower courts' findings that Petitioner failed to prove many of these acts of sexual harassment was clearly erroneous as a matter of law in that a review of the record will leave the Court with the definite and firm conviction that a mistake has been committed *See Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). The facts of this case clearly show that the Respondents, instead of taking prompt, effective and remedial action in response to Petitioner's complaints of sexual harassment, denied her a transfer; left it up to her to resolve the problem of the harassment by talking to each of her team members; counseled her on her alleged failures to follow the chain of command in bringing her complaints of harassment and to talk to each of her team members as ordered; suspended her pending an investigation into her complaints when the hostile environment reached the point of actually becoming a safety violation in the Station; accepted the harassers denials of wrong doing at face value during the investigation into her complaints; accused her of being mentally unfit for duty without justification; forced her to resubmit to two psychological examinations; and then terminated her on that basis.

Such actions simply can not be allowed to serve to protect the Respondents from liability. It should be only in those instances in which the employer can show that the conduct and or mental status of the employee was caused by some other factor other then the employer's failure to take prompt, effective and remedial action, that an employer should be allowed to use the employee's conduct and or mental status as the basis for disciplinary action against the employee. Any attempt to use conduct caused by the sexual harassment against

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pertinent to Petitioner's ultimate claim that her employers not only allowed the hostile environment to exist, but took part in it by failing to take prompt, effective and remedial action thereby becoming part of the hostile environment it knew to exist.

the employee will only serve as yet another incident of sexual harassment in the overall hostile environment claim.

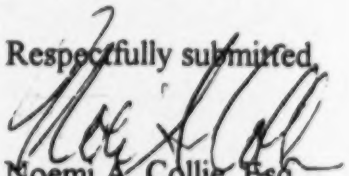
It is crystal clear in the instant case that Petitioner never did anything but seek protection from sexual harassment by her team members and that instead of correcting the situation the Respondents simply becomes a part of the problem and additional harassers.

Along these same arguments it is claimed that the Respondent may not use Petitioner's mental state at the time of her psychological examinations against her unless they can prove such mental state was caused by some other factor other then the sexual harassment and Respondent's failure to remedy it. The facts of this case clearly prevent Respondent from being able to prove Petitioner's mental state at the time of Dr. Burger's and Dr. Sedlacek's evaluation was due to anything other then the harassment she was by this time experiencing from both her team members and her superiors. No diagnosis was made explaining Petitioner's state of mind or test results. No determination was made that Petitioner was not experiencing sexual harassment as she had claimed. Without some evidence that Petitioner was mentally unfit for some reason other then the sexual harassment she has in fact proved to have existed, the Respondent should not be allowed to rely on her mental unfitness as protection for liability against her claim of wrongful termination. But for the sexual harassment of her co-workers, and Respondent's failure to remedy the situation, she never would have been sent to have a psychological exam and she would never have suffered the symptoms the doctors relied upon in coming to the conclusion that Petitioner was mentally unfit. There is no evidence to the contrary. This situation should be treated the same as though Petitioner was suspended and terminated because of her gender since the harassment goes back to the harassment she suffered because of her gender.

CONCLUSION

For all the reasons stated, Petitioner prays that this Court grant a Writ of Certiorari to review the decision of the Eighth Circuit Court of Appeals to affirm the decision of the trial court.

Respectfully submitted,



Noemi A. Collie, Esq.
434 W. 12th Street
Dallas, Texas 75208
(214) 942-6812
(214) 942-6818 (fax)

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

DONNA FRED,	*	
	*	
Plaintiff,	*	8:CV-90-00734
	*	
VS.	*	
	*	
WACKENHUT CORPORATION and OMAHA PUBLIC POWER DISTRICT,	*	
	*	
Defendants.	*	

This matter was tried to the Court pursuant to 42 U.S.C. Sec. 2000e-5(f)(3), on July 5-8, 11-13, and August 1-2, 1994. After hearing the testimony and examining the exhibits, the Court, pursuant to Fed. R. Civ. P. 52, makes the following findings of fact and conslusions of law.

BACKGROUND

The parties stipulate that plaintiff was hired by the Wackenhut Corporation (TWC) on February 8, 1989, as a nuclear security officer at the Omaha Public Power District's (OPPD) Fort Calhoun Nuclear Power Station (Station). OPPD had contracted TWC to provide security at the station.[1a] Following a four-week training period, plaintiff was certified as a foot patrol and response officer, effective March 6, 1989. However, she lost this status on March 8, 1989, was recertified on March 17, and on April 6, 1989, OPPD withdrew her "unescorted access" to the station until such time as she met certain federal regulatory standards. TWC then suspended plaintiff from duty at the station. Plaintiff was formally served with notice of her

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1a Because each party appears to have exercised joint control and supervision over the security officers, the issue arises as to whether TWC, OPPD, or both entities employed the guards. Resolution of this issue is unnecessary because the Court finds no Title VII violation.

termination on June 6, 1989, having never returned to work at the station.

After filing complaints with the NEOC and EEOC and receiving their determinations that no violation of Title VII occurred, plaintiff filed this action. The gravaman of her complaint is that during and after her tenure at the Station, she was sexually harassed by her fellow workers and management of both OPPD and TWC. She further claims that despite her reports of the harassment, her employer failed to take prompt remedial action. She alleged that the harassment interfered with the terms and conditions of her employment and ultimately concluded in her termination in violation of Title VII.

DISCUSSION

Before plaintiff's sexual harassment and discrimination allegations are explored in detail, the Court must initially determine the controlling law in this case. Specifically, the Court must first consider what standards to apply to plaintiff's sexual harassment claim and, second, determine the proper legal framework to analyze her Title VII complaint. The Court addresses these issues in order.

SEXUAL HARASSMENT

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. Sec. 2000e-2(a)(1). The phrase "terms, conditions, or privileges of employment" includes requiring people to work in a discriminatorily hostile or abusive environment. *Meritor Savs. Bank v. Vinson*, 477 U. S. 57, 64 (1986). When a work environment is permeated with "discriminatory intimidation, ridicule, and insult," that is severe or pervasive enough to alter the conditions of the victim's workplace, Title VII is violated. *Id.* at 65; *Harris v. Forlift Sys., Inc.*, ____ U.S. ____, 114 S.Ct. 367, 370 (1993).

To establish a Title VII hostile environment claim based on sexual harassment, plaintiff must how:

(1) she belongs to a protected group;

(2) she was subject to unwelcome sexual harassment;

(3) the harassment was based on sex;

(4) the harassment affected a term, condition, or privilege of employment; and,

(5) the employer knew or should have known of the harassment and failed to take proper action.

Burns v. McGregor Elec. Indus., Inc., 955 F.2d 559, 564 (8th Cir. 1992)(*Burns I*).

Hostile-environment sexual harassment is actionable under Title VII when it is sufficiently patterned or pervasive. *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993). To make such a determination, the Court must consider the totality of the circumstances, including: "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humilitating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Harris*, ___ U.S. at ___, 114 S.Ct. at 371. This is not a "mathematially precise test," *Id.*, and the Court should not pigeon-hole each alleged sexually harassing episode and measure the harm occurring in each incident. *Burns I*, 955 F.2d at 564. "[A] discrimination analysis must concentrate not on individual incidents but on the overall scenario." *Id.* (*citing Andrews v. Philadelphia*, 895 F.2d 1469, 1484 (3d Cir. 1990).

The appropriate standard when evaluating the evidence in hostile environment litigation is that of a reasonable woman under similar circumstances. *Burns v. McGregor Elec. Indus., Inc.*, 989 F.2d 959, 962 (8th Cir. 1993) (en banc) (*Burns II*). "Thus, behavior a reasonable woman would find objectionable may be actionable even if many people deem it to be harmless or insignificant." *Id.* (citations omitted). Therefore, it is important to note that sexual harassment can occur in many different ways. *Id.* at 964. As the Court stated in *Burns II*, "A female worker need not be propositioned, touched offensively, or harassed by sexual innuendo . . . hostility toward women because they are women can obviously result from conduct other than explicit sexual advances. *Id.* at 964 (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988)).

Therefore, the Court must consider all evidence that suggests a hostile work environment. However, only those incidents of unequal treatment of the plaintiff that would not occurr but for the sex of the plaintiff, if sufficiently patterned and pervasive, will be

considered as an illegal condition of employment under Title VII. *Hall v. Gus Constr. Co.*, 842 F.2d 10101, 1014 (8th Cir. 1988) (citing *McKinney v. Dole*, 765 F.2d 1129, 1139 (D.C.Cir. 1985)). The Court must carefully walk what the Supreme Court describes as "a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris*, ___ U.S. at ___, 114 S.Ct. at 370. Behavior or language that merely engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII.

MIXED MOTIVES FORMULA[2a]

Plaintiff has not directed the Court to the theory under which she intended to prove her case, i.e., either under the "mixed motives" approach articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), or under the "indirect evidence" analysis of *McDonnell Douglas Corp. v. Green*, 411 S.Ct. 792 (1973). The distinction is crucial because of the difference of the burdens of production and proof. Nevertheless, the Court must make a specific finding as to which theory applies to the instant case. *Stacks v. Southwestern Bell Yellow Pages*, 996 F.2d 200 (8th Cir. 1993).

The Court finds that the *Price Waterhouse* mixed motives approach is the appropriate theory for this case. Plaintiff has attempted to produce direct and circumstantial evidence that her gender was a motivating factor in her termination. If plaintiff meets her burden by a preponderance of the evidence, the burden of persuasion shifts to the defendants, who must show that they would have made the same decision even if they had not taken gender into account. *Beshears v. Asbill*, 930 F.2d 1348, 1353 (8th Cir. 1991). If the defendants meet this burden, they avoid liability. *Price Waterhouse*, 490 U.S. at 244-45.

Having resolved the principal legal issues of this case, the Court will now examine plaintiff's specific factual allegations.

ANALYSIS

2a The Court notes that the mixed-motivations defense as applied prior to the enactment of the Civil Rights Act of 1991 is controlling in this case. After the Supreme Court's holding in *Landraf v. USI Film Prods.*, ___ U.S. ___, 114 S.Ct. 1483 (1994), it is well-settled that the 1991 Act does not apply retroactively to claims actionable prior to the Act's enactment on November 21, 1991.

The Court's inquiry begins with the second *Burns I* compenent: whether or not plaintiff was subject to unwelcome sexual harassment. *Burns I*, 955 F.2d at 564. If a finding of sexual harassment is made, then the Court will consider whether that harassment was based on sex, whether it affected a condition of employment, and whether TWC or OPPD knew or should have known of the harassment and failed to take proper action. *Id.*

The Court considers the "overall scenario" when analyzing whether plaintiff's workplace was hostile. *Burns I*, 955 F.2d at 564. However, for convenience plaintiff's allegations are considered as they were presented in plaintiff's complaint to the Nebraska Equal Opportunity Commission and with the Equal Employment Opportunity Commission (Exhs. 103, 104, 105, 106): 1) she was handed a styrofoam cup upon which was written sexually suggestive and offensive language, 2) a co-worker advised her that was suspended because she was "not putting out" and 3) she was suspended pending and internal investigation. In her trial brief and during her testimony, plaintiff discussed several additional incidents of conduct that she alleges constitute sexual harassment. The Court will examine these charges in order.

THE CUP INCIDENT AND OTHER ALLEGATIONS

On March 17, 1989, plaintiff and other security guard trainees were in a training facility on the Station site. At some point plaintiff was presented a styrofoam coffee cup upon which was written the words "Suck my dick Ma-donna" or some such language and equally offensive illustrations. The plaintiff describes her reaction as being "shocked and really disappointed because I felt like I had a lump right in my chest." (Tr. 144).

Other incidents of alleged sexual harassment that occurred before and after the cup incident include a co-worker referring to her as a "civilian" (Tr. 156), being told that she would never be "anything but a fucking guard" (Tr. 163-64), people making distracting noise in the training room (Tr. 515, 519), listening to co-workers make sexist remarks over the Station's intercome system (Tr. 553, 555), being purposely contaminated with radiation, lack of friendly conversation (Tr. 521), hearing the sound of squeking chairs over the intercom (Tr. 551) and general "behind the scenes abuse" (Tr. 510). During her testimony, plaintiff stated that the sexual harassment continued up

until and during the trial itself and plaintiff described the work environment as "day to day harassment" (Tr. 511).

As for the cup incident, the Court concludes that such conduct goes beyond that which is merely offensive, but is instead humiliating and degrading behavior aimed at the plaintiff. The Court acknowledges that the testimony is unclear as to who penned the words and pictures and whether or not plaintiff was handed the cup or if she asked a co-worker if she could see it. Nevertheless, it is unquestionable that the cup existed and that it was inscribed with sexually frank and repugnant material sufficiently offensive to constitute sexua harassment.

Regarding the other allegations, including those raised for the first time at trial but not noted in this opinion, the Court cannot conclude that those incidents constitute sexual harassment. After carefully examining the record and considering the credibility of the witnesses, including the plaintiff's, the Court finds that plaintiff failed to prove that many of her allegations of sexual harassment ever occurred. For those that are supported by some evidence, the Court concludes that they do not rise to the level of sexual harassment as contemplated by the law. For example, other than her bar assertion, plaintiff did not present any evidence to prove a conspiracy existed to intentionally contaminate her with radiation. Another example is her complaint that comments of a sexual nature were made over the intercom system. However, even if they werem, there is no evidence that they were ever directed at plaintiff. Indeed, there was credible testimony that during plaintiff's tenure at the Station the intercom system did not even function (Tr. 926) and, in any event, any derogatory language ceased after a memorandum was circulated by plaintiff's superior, TWC Project Manager Larry Jones, advising the guards that such conversations would not be tolerated (Tr. 1222-23; Exh. 1).

However, it is unnecessary to engage in a detailed discussion as to why each claim fails for lack of evidence because once defendants were aware of plaintiff's sexual harassment charges, defendants took the requisite prompt remedial action. On March 25, 1989, a meeting for plaintiff's co-workers was called by their superiors, OPPD Security Shift Supervisor Ronal Undajon and TWC Team Leader Tim Boettger. At this meeting, a memorandum was circulated that admonished the employees to cease any harassment

(Exh. 22). Plaintiff herself also addressed her co-workers at the meeting and asked them to stop what she considered sexual harassment and that she wanted to be a member of the team (Exhs. 61 & 35). Undajon told the guards that he would not tolerate sexual harassment at the Station (Tr. 173-74).

The Court concludes that this meeting and the accompanying memorandum was proper, effective and sufficient remedial action to stop further sexual harassment and, therefore, TWC and OPPD did take proper action as required by *Burns I*. Indeed the evidence shows that once the defendants were made aware of plaintiff's claims, they called the March 25 meeting and circulated the memorandum and no additional sexual harassment was reported. Although plaintiff argues that the harassment continued after the meeting, there was no credible evidence of continued harassment presented to the Court. Indeed, the effectiveness of the meeting and the memorandum is underscored by plaintiff's own testimony during cross examination. In response to a question concerning why the guards no longer made sexually oriented remarks over the intercom, plaintiff stated "They were afraid to lose their jobs" (Tr. 640).

The Court therefore concludes that but for the cup incident on March 17, no other episodes of sexual harassment occurred at the Station. Consequently, the Court finds that the harassment was not severe or pervasive enough to alter the conditions of the workplace. Furthermore, the Court concludes that any sexual harassment was arrested by the prompt remedial action taken by OPPD and TWC through the March 25 meeting.

PLAINTIFF'S SUSPENSION

Plaintiff alleges that her suspension from duty on April 6, 1989, constitutes sexual harassment. According to plaintiff, on the morning of April 6, she was "counseled" or disciplined by Boettger for her repeated failure to follow the organizational chain of command, for not providing TWC with a contact telephone number, and for her failure to meet with her fellow team members as she had been instructed to do. He presented her with a "Record of Formal Counseling" (Exh. 36), a form of disciplinary report, detailing these problems for her signature. Plaintiff denied the allegations, refused to sign the report and threatened to give it to the Better Business Bureau (Exh. 37). Plaintiff alleges that Boettger repeatedly

"hollered" at her to "shut up" and would not listen to her excuses for the violations included in the report (Tr. 212-221).

Plaintiff contends that she then went to talk to Undajon, who, according to plaintiff, read Boettger's counselling form, told plaintiff to "shut up" and had her removed from his office by two guards (Tr. 224). Undajon "deactivated" her security badge, which effectively terminated her unescorted access to the Station.

Finally, Jones was advised by Undajon that plaintiff's badge was deactivated. Jones then told plaintiff that she was suspended pending an investigation and that she should go home (Tr. 228).

During her conversation with Boettger, Undajon and Jones, plaintiff contends that she behaved in a quiet, straightforward and professional manner.

However, according to Boettger, plaintiff refused to follow instructions to sit down and she became "totally irrate [sic] and irrational" and began to rant (Exh. 22). Undajon noted that when he spoke to plaintiff she was "uncontrollable, that she was yelling, and that she would not sit down and discuss the problem, [and] she started 'ranting and raving'" (Exh. 101 p. 9). In her meeting with Jones, plaintiff was argumentative, insubordinate and refused to accept Jones' decision to suspend her because OPPD deactivated her badge. (Tr. 1229, Exh. 32).

Plaintiff claims that this series of events, including the actual suspension from her position, constitutes a cognizable sexual harassment claim.

The Court recognizes that sexual can occur in many ways other than through explicit sexual advances, *Burns II*, 989 F.2d at 964. However, even if the Court accepts plaintiff's version of the events on the morning of April 6, 1989, the Court must still conclude that there is no evidence to support the contention that plaintiff's suspension constituted sexual harassment. There is absolutely nothing in the record to even suggest that the deactivation of her badge and her eventual suspension were motivated by anything other than the violations noted in the Record of Formal Counseling and her behavior during her meetings with Boettger, Undajon and Jones. Although plaintiff may not feel that the violations in the Record of Formal Counseling were justified, this Court is not the forum to debate the judgment of plaintiff's superiors. The record is replete with evidence that plaintiff's behavior on April 6, and not sexual

harassment, made it incumbent upon TWC and OPPD to disarm and remove plaintiff from the Station.

SEXUAL PROPOSITIONS

Finally, plaintiff alleges that another episode of sexual harassment occurred in April 10 -- four days after her suspension -- when a former co-worker, Arthur L. Marr, advised her during a telephone conversation that she was having problems at work because she was "not putting out." She also claims that he stated that "him [sic] and his wife had an open relationship and that their relationship was such that they had 'casual sex' and he was suggesting that I have casual sex" (Tr. 315-16).

No corroborating evidence or testimony was adduced at trial other than her lone accusations. Marr himself emphatically and categorically denied that he propositioned or otherwise discussed sex with plaintiff (Tr. 289-90). The Court finds that plaintiff's claims regarding Marr are wholly unsubstantiated.

In addition, plaintiff claims that this conversation occurred many days after her suspension while she was at home. There is no evidence of any improper remarks or conduct by Mr. Marr at the workplace. In fact, the plaintiff and Mr. Marr were on different teams. Even accepting the notion that the exchange occurred, the Court finds that Marr's alleged sexual proposition did not affect her in her workplace.

For these reasons, the court concludes that plaintiff's allegations against Marr are not credible nor relevant to the issues and they will therefore not be considered as an episode of sexual harassment.

PLAINTIFF'S TERMINATION

It is important to note that even if the Court concluded that plaintiff was successful in showing that gender played a part in her suspension and subsequent termination, under the rule articulated in *Price Waterhouse*, the Court would be obligated to find for the defendants. Thus, even if plaintiff met her burden, defendants would avoid liability if they demonstrated that they would have made the same decision even if they had not taken gender into account. *Price Waterhouse*, 490 U.S. at 244-45.

This burden could be easily satisfied by defendants. Under 10 C.F.R. Sec. 73, App. B, specific physical and mental standards are

required by the Nuclear Regulartory Commission. That Part states, in pertinent part:

> 2. Mental qualifications:
>
> b. Armed individuals and central alarm station operators . . . shall have no emotional instability that would interfere with the effective performance of assigned security job duties. The determination shall be made by a licensed psychologist or psychiatrist, or physician, or other person professionally trained to identify emotional instability.

After plaintiff's suspension on April 6, she underwent a psychological examination conducted by a licensed clinical psychologist, Dr. James M. Burger, Ph.D. He prepared a profile of plaintiff which concluded that she had (1) Argumentative Hostility Toward Authority, (2) Adverse Reaction to Stress, and (3) Emotional and Personal Inadaptability (Exh. 88). His findings were confirmed by a collegue, Dr. Caroline G. Sedlacek, Ph.D., who concluded that "Mrs. Fred cannot handle the type of responsibility and team work required at the nuclear plant . . . . I supppose one could build a strong case for a mixed personality disorder." (Exh. 87). On the basis of his conclusions and those of Dr. Sedlacek, Dr. Burger would not certify plaintiff was competent to discharge her duties as an armed security officer (Exh. 38). Consequently, plaintiff was terminated on June 8, 1989.

Thus, pursuant to 10 CFR Sec. 73 App. B, plaintiff was unfit for duty and TWC's only option was to terminate her as an armed security officer at the Station or risk violating the Nuclear Regulatory Commission's rules. Therefore, even if plaintiff had met her burden, the evidence established that they would have terminated her.

CONCLUSION

For these reasons, the Court finds that plaintiff has failed to established her claim that she was subject to a discriminatorily hostile or abusive work environment or that her gender played a part in defendants' decisions which led to the termination of her employment. A separate order will be entered in accordance with this memorandum opinion.

DATED this 15th day of August, 1994.

BY THE COURT:

s/Lyle S. Strom
LYLE E. STROM, Chief Judge
United States District Court

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-3346NE

Donna Fred,	*	
	*	
Appellant,	*	
	*	Appeal from the United
VS.	*	States District Court for
	*	the District of Nebraska
Wackenhut Corporation; Omaha	*	
Public Power District,	*	(UNPUBLISHED)
	*	
Appellee.	*	

Submitted: April 10, 1995
Filed: May 4, 1995

Before FAGG, Circuit Judge, HENLEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

PER CURIAM.

After a bench trial, the district court rejected Donna Fred's Title VII hostile environment claim based on sexual harassment. On appeal, Fred argues that most of the district court's findings are clearly erroneous. Because the controlling law is clear, our review satisfies us that an opinion would have no precedential value in this fact-intensive case. We further conclude the district court's fact findings are not clearly erroneous and no error of law appears. We thus affirm the judgment of the district court. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-3346NE

Donna Fred,	*	
	*	
Appellant,	*	8:CV90-734
	*	Appeal from the United
VS.	*	States District Court for
	*	the District of Nebraska
Wackenhut Corporation; Omaha	*	
Public Power District,	*	(UNPUBLISHED)
	*	
Appellee.	*	

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is affirmed in accordance with the opinion of this Court.

May 4, 1995.

A true copy.

ATTEST: s/Michael E. Gans
CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.
MANDATE ISSUED
May 25, 1995

Copies mailed on 6-2-95.